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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOSEPH WEISS et al., Plaintiffs and Appellants, v. INTERINSURANCE EXCHANGE OF THE AUTO CLUB, Defendant and Respondent.	D047660 (Super. Ct. No. GIC83404)

APPEAL from a judgment of the Superior Court of San Diego County, S. Charles Wickersham, Judge. Affirmed in part; reversed in part.

I.

INTRODUCTION

Joseph and Nancy Weiss appeal from a judgment entered after a bench trial in which the court found in favor of defendant Interinsurance Exchange of the Auto Club (Exchange) on the Weisses' breach of contract and declaratory relief claims. The Weisses

sued the Exchange under three separate homeowners insurance policies covering three different residences, seeking $1,636,200 in coverage for the loss of a family collection of books, prints, lithographs and other artifacts after the collection was destroyed in a fire. The Weisses had loaned portions of their personal collection to an organization known as the Friends of Chabad Lubavitch (Chabad). A wildfire, known as the Cedar fire, destroyed most of Chabad's Scripps Ranch campus, where the Weisses' collection was located.

The Exchange acknowledged that the fire caused the total loss of the collection. However, the Exchange concluded that coverage for that loss was limited to 10 percent of each of the three policy's limits because, the Exchange determined, the collection fell within a limitation provision in all three of the Weisses' homeowners policies pertaining to personal property not "usually situated" at the covered residences. The Exchange paid the Weisses 10 percent of the policy limits on each of their three homeowners policies. The Weisses brought this lawsuit seeking full coverage under each of the policies.

The trial court ruled in favor of the Exchange, concluding that the term "usually situated" is unambiguous, and that the collection was not "usually situated" at any of the Weisses' residences at the time of the fire. The court concluded that because the Weisses had loaned their collection for an indefinite period of time, and because Chabad intended to send some items from the Weisses' collection to other Chabad centers around the world, the collection could not be considered to be "usually situated" at any of the Weisses' residences. The court also concluded that there were additional, independent

reasons why the three portions of the collection could not be considered to be "usually situated" at any of the residences.

On appeal, the Weisses claim that the trial court erred in concluding that the phrase "usually situated" is unambiguous in these circumstances. The Weisses also contend that the trial court erred in holding that the personal property limitation was conspicuous, plain and clear. The Weisses further maintain that the court should have applied estoppel principles to require the Exchange to pay the policy limits on all of the policies, claiming that the Exchange's agent promised them that coverage for their personal property would continue uninterrupted during the period between the sale of their first home, which was insured by the Exchange, and the completion of construction of their new home. Finally, the Weisses assert that with respect to the property lost from their first home, the trial court erroneously failed to apply an exception to the 10 percent limitation that allows for full coverage for 30 days after property is moved out of the covered residence and into a new residence.

We conclude that the trial court correctly determined that the 10 percent limitation applies to the property covered under the Weisses' homeowners policy on the first home, the Avenida Alteras residence, and that the Exchange has already paid that amount in full. We further conclude that the trial court incorrectly determined that the phrase "usually situated" is not ambiguous with regard to the personal property covered under the policies on the second and third homes, the Calle Portone and Calle Amanacer residences. We therefore affirm the trial court's ruling that the Exchange is required to pay the Weisses only 10 percent of the Avenida Alteras policy limit for unscheduled

personal property, and reverse the trial court's ruling that that the Exchange must pay the Weisses only 10 percent of the limits for such property under the Calle Portone and Calle Amanacer policies.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *General background*

Joseph Weiss and his wife Nancy built a large home at 6039 Avenida Alteras in Rancho Santo Fe in 1986. The Exchange began insuring the Avenida Alteras home in 1998, after Joseph Weiss met with the Exchange's agent, Ed Biddison, at the residence. The homeowners insurance policy on the Avenida Alteras home had a limit of $1,071,000 for the loss of unscheduled personal property.

Joseph Weiss testified that he told Biddison that the family planned to eventually sell the Avenida Alteras home and build a new home on another parcel of land the Weisses owned. Joseph Weiss discussed a number of alternatives the family was considering as to how to make the move, and said that one option would be to sell the Avenida Alteras home before the new home was built, and move into a smaller home in the interim.

In early 2002, the Weisses decided to list the Avenida Alteras home for sale and begin construction on a new home. They purchased a second, smaller home on Calle Portone in October 2002, in which they planned to live until construction of their new home was completed. The Exchange issued a homeowners policy on the Calle Portone property with a limit of $411,750 for unscheduled personal property loss. The Weisses

sold the Avenida Alteras home in April 2003, and title was transferred to the new owner. The Weisses continued to pay the premiums on the Avenida Alteras policy after they sold the house.[1]

In May 2003, the buyer of the Avenida Alteras property began to complain about window leaks and mold problems in the home, and threatened to rescind the sale agreement. The parties engaged in a mediation on September 26, 2003 and entered into a settlement agreement on that date. Also in May 2003, the Weisses purchased another home, located on Calle Amanacer, because the Calle Portone home was too small to meet the family's needs.[2] The Exchange issued a homeowners policy on the Calle Amanacer property with policy limits of $334,500 for unscheduled personal property.

All three of the Weisses' homeowners policies contained language pertaining to coverage for unscheduled personal property under the heading "COVERAGE C." Although the coverage amounts under the policies differed, the language in these policies regarding coverage of personal property is identical: "Under Coverage C we cover

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1 The Exchange was aware that the Weisses had sold the Avenida Alteras home in April 2003, but did not cancel the Avenida Alteras policy or refund any of the premiums the Weisses paid on the policy after they sold the home. In fact, the Exchange confirmed in an October 18, 2004 letter to the Weisses that their coverage under the Avenida Alteras policy would continue until December 22, 2004, and stated that, at that time, the policy would be terminated.

2 According to the Weisses, the threatened rescission of the sale agreement on the Avenida Alteras residence prompted the Weiss family to list the Calle Amanacer home for sale in late July 2003.

personal property owned or used by any ***insured*** while it is anywhere in the world."[3] A limitation on this coverage provides: "Our limit of liability for personal property usually situated at a location other than the ***residence premises*** is 10% of the amount of the limit of liability for COVERAGE C." An exception to this limitation provides, "Personal property in a newly acquired principal residence is not subject to this limitation for the 30 calendar days immediately after you begin to move the property there."

Each of the policies defines the term "residence premises" as "the one or two family dwelling, other structures and grounds, or . . . that part of any other building, that is used by you as a residence and that is shown as the 'residence premises' in the declarations."

B. *The Weisses' collection of family artifacts*

Joseph Weiss's grandfather was a Hungarian citizen prior to World War II. He decided to emigrate before the Nazi occupation. Because of the difficulty he would face in transporting cash and/or jewelry across national borders, Weiss's grandfather purchased books, prints, lithographs, and other items that were less likely to arouse suspicion upon shipment. Joseph Weiss's grandfather shipped these items, a few at a time, from Hungary to other parts of the world. A number of the items reached the United States via Canada. Joseph Weiss inherited approximately one-third of his grandfather's original collection.

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3 The formatting is found in the policy.

The items in the inherited collection were not particularly valuable on an individual basis, but together, the collection was quite valuable. The collection had special significance to the Jewish community because it represented the manner in which European Jews seeking to escape Nazi occupation converted their wealth into seemingly insignificant items that they could ship out of Europe without drawing attention.

The Weisses hired a professor of art from the University of Michigan to appraise their collection. Dr. Emil Weddige catalogued and appraised approximately 85,000 separate items over a number of years, and filed his last report concerning the collection in 2002, shortly before he died.[4] Dr. Weddige concluded that the value of the portion of the collection he had appraised was $7,619,285.

For a number of years, the Weisses stored their entire collection in cardboard boxes in the garage of the Avenida Alteras residence. When the Weisses purchased the Calle Portone home in October 2002, they moved approximately 30 percent of the collection from the Avenida Alteras home to the Calle Portone home. When they then purchased the Calle Amanacer home in May 2003, the Weisses moved a portion of the collection that they had been storing at the Calle Portone home to the Calle Amanacer home.

C. *The loans to Chabad*

Chabad operates a religious, educational, and social service center in the Scripps Ranch area of San Diego. There are approximately 3,000 similar centers around the

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4 Dr. Weddige did not appraise all of the items in the collection prior to his death.

world. Over a period of several years, the Weisses discussed with Chabad the possibility of donating or loaning portions of the Weiss family collection to the organization.

In February 2003, the Weisses agreed to loan to Chabad a portion of the collection from the Avenida Alteras home. Rabbi Jonah Fradkin, director of the Scripps Ranch Chabad Center, acknowledged the loan in a letter dated February 7, 2003. Certain pages from Dr. Weddige's appraisal report were attached to the Rabbi's letter, showing that the appraised value of the items in question was $5,088,790.

Chabad apparently received an enthusiastic response to the exhibition of items from the Weisses' collection. Chabad asked the Weisses if they would be willing to loan more material from the collection for exhibition at a grand opening related to the Chabad school. On August 8, 2003, the Weisses loaned Chabad additional portions of the family collection, which they had been storing at the Calle Portone residence. On August 22, 2003, the Weisses made an additional loan to Chabad of the portion of the collection from the Calle Amanacer home. Rabbi Fradkin acknowledged receipt of the additional loaned items in two separate letters to the Weiss family, dated August 8, 2003 and August 22, 2003. Attached to each letter was the portion of Dr. Weddige's appraisal report that listed the items that had come from each home, and the appraised value of those items. The items loaned from the Calle Portone property had an appraised value of $1,315,770, and the items loaned from the Calle Amanacer property had an appraised value of $1,214,725. All three of the letters Rabbi Fradkin sent were identical, with the

exception of the dates, the addresses shown for Joseph Weiss, and the value of the donated items.[5]

The Weisses also donated a separate portion of their collection to Chabad. The portion donated to Chabad apparently consisted of items Dr. Weddige had not appraised before his death.[6]

D. *The Cedar fire and the Weisses' insurance claims*

All of the items the Weisses had loaned to Chabad were being housed at Chabad's Scripps Ranch facility on October 26, 2003. On that date, the Cedar fire destroyed the entire collection.

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5 The letters include the following paragraphs, which appear to be standard, as opposed to personalized, language: "Friends of Chabad Lubavitch, San Diego is one of three thousand Chabad centers worldwide dedicated to the furtherance of Jewish Education and social services each according to the need of their respective communities. Friends of Chabad Lubavitch, San Diego serves the local San Diego region through its ten centers across the county and Baja California, Mexico by providing local communities with social services, counseling, drug and substance abuse prevention, hospital and prison chaplaincy and Jewish cultural events. [¶] With the receipt of this loan Friends of Chabad Lubavitch, San Diego is enabled to further our cultural and education mission on a global scale. Our newly created Jewish Heritage Library has initiated a lending network of fine art, ancient prints and literature to countless libraries through our 3000 affiliate centers around the world thereby helping the entire network of Chabad Lubavitch centers worldwide further our common goal. We are happy to say that we have begun loan of exhibits that represent a cross section of our collection to centers throughout Israel and Africa. [¶] Chabad, under the auspices of our beloved Rebbe, Menachem Mendel Schneerson, ob"m, makes certain that after the loss of Jewish lives during the Holocaust period to embark [sic] on a program that would correct the loss of Judaism with a strong sense of Yiddishkeit within the Jewish population over the past years. Chabad brings the acknowledgement and love of Judaism to each and every Jew."

6 The Weisses did not seek homeowners policy benefits for any of the items they had donated to Chabad.

Chabad confirmed the total loss of the loaned collection in a letter to Joseph Weiss dated February 27, 2004. In March 2004, an attorney acting on behalf of the Weisses notified the Exchange of the loss of the collection and of the Weisses' claims for benefits under the homeowners policies. The combined limit for unscheduled personal property loss under the three policies was $1,851,000.

On July 23, 2004, the Exchange issued three separate checks to Joseph Weiss to cover the Weisses' personal property loss. The check paid under the Avenida Alteras policy was for $107,175; the check paid under the Calle Portone policy was for $41,175; and the check paid under the Calle Amanacer policy was for $33,450.

In a letter dated August 17, 2004, the Exchange explained that the checks it had sent to Joseph Weiss represented 10 percent of the policy limits for personal property loss under each of the three homeowners policies:

> "We have concluded, based on the indefinite length of the loan, that all of the items (whether previously located at the Avenida Alteras residence, the Calle Portone residence or the Avenida Amanacer residence) were usually located away from the three residences at the time of the fire. [¶] In addition, because the Weisses sold the Avenida Alteras residence prior to the fire, we have concluded that the items of personal property that previously had been located at the Avenida Alteras residence were usually situated elsewhere at the time of the fire. Once the Weisses sold the Avenida Alteras residence, they could not ever bring the items of personal property back to that residence. [¶] Because we have concluded the items were usually situated at a location other than the residence premises described in the three policies, we have concluded that the maximum owed under any policy is 10% of the limit for personal property."

E. *The Weisses' lawsuit*

The Weisses filed a complaint against the Exchange alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. Prior to trial, the parties entered into a settlement pursuant to which the Weisses dismissed their claim for breach of the implied covenant of good faith and fair dealing.

The parties stipulated to a number of facts, including the following: (1) at the time of the fire, all three policies were in effect; (2) the "personal property that plaintiffs lost in the October 23, 2004 fire was covered under all three policies"; (3) the value of the destroyed personal property exceeded the limits for personal property loss under all three policies; (4) the property was completely destroyed by the October 26, 2003 fire and fire is a covered loss under each of the insurance policies; (5) the Exchange paid the Weisses $181,800 under all three policies—an amount equal to 10 percent of the combined policy limits; and (6) the parties settled the cause of action for breach of the implied covenant of good faith and fair dealing and would not seek damages under that cause of action.

Both parties waived jury on the first day of trial.[7] The trial court heard testimony from Joseph Weiss; Rabbi Fradkin; Ed Biddison; Kim Reckles, another Exchange agent who had worked with the Weisses; and Jimmy Young, the Exchange's unit manager for homeowner claims, who had signed the August 17, 2004 letter to the Weisses.

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[7] On the first day of trial, the parties filed two additional sets of stipulations that further narrowed the factual issues by establishing the sale dates for the Avenida Alteras and Calle Amanacer residences, and setting the date of the settlement of the rescission claim by the Avenida Alteras buyer as September 26, 2003.

Joseph Weiss and Rabbi Fradkin each testified that the loans the Weiss family made to Chabad were intended to be temporary, and that the parties anticipated that the loaned items would be returned to the Weisses after the grand opening of a new classroom building that was scheduled to take place in September 2003, but that had been delayed to the spring of 2004. Rabbi Fradkin testified that his three letters were not intended to give the impression that Chabad intended to send the items the Weisses had *loaned* to other Chabad centers around the world, but rather, that property they had *donated* to Chabad would be exhibited at other Chabad centers.

The Exchange argued that all of the items in the collection were "usually situated" at a place other than the three residences, within the meaning of the policy exclusion, for a number of reasons. The Exchange argued that because the Weisses had sold and moved out of the Avenida Alteras property nearly seven months before the fire, none of the items from the residence could be considered to be "usually situated" there. The Exchange also argued that although the Weisses were living in the Calle Portone property at the time of the fire, they were living there only on an interim basis, until construction on their "dream home" was completed. Because the Calle Portone home was not a permanent residence, none of the items could be considered to be "usually situated" there. Finally, the Exchange argued that because the Weisses had owned the Calle Amanacer property for only two months when they listed that residence for sale and had never lived in it, and because that home was listed for sale at the time of the fire, the items that had previously been stored at the Calle Amanacer property were "usually situated" away from that location, i.e., at Chabad, at the time the fire occurred.

The Exchange further argued that all of the items were "usually situated" away from the three residences at the time of the fire because the loans of the items to Chabad were open-ended and indefinite, and because Chabad intended to loan the items to other Chabad centers around the world.

On August 8, 2005, the trial court announced its tentative decision, ruling in favor of the Exchange on both the breach of contract and declaratory relief causes of action. The trial court concluded that the 10 percent limitation in each of the three policies applied, and that the Exchange had fulfilled its duties under the contract by paying the Weisses 10 percent of the policy limits for unscheduled personal property on each of the policies.

The Weisses requested a statement of decision on August 11, specifying 24 principal controverted issues. The Exchange prepared a proposed statement of decision that concluded that the limitation that included the phrase "usually situated" was unambiguous and conspicuous. The statement of decision also concluded that the 10 percent limitation applied to all of the property the Weisses had loaned to Chabad under all three policies because the loans to Chabad were indefinite, rendering the collection not "usually located" at any of the three residences. The statement of decision included additional, distinct reasons applicable to each policy individually, for concluding that the 10 percent limitation applied.

The Weisses objected to the proposed statement of decision on September 14, and requested a hearing on the matter. On September 16, the trial court denied the Weisses' request for a hearing, overruled their objections, and signed the Exchange's proposed statement of decision. The court entered judgment on October 7, 2005. Counsel for the Exchange served a notice of entry of judgment on October 21. The Weisses filed a timely notice of appeal.

III.

DISCUSSION

A. *The 10 percent coverage limitation applies to the Weisses' claim under the Avenida Alteras policy, but not under the Calle Portone and Calle Amanacer policies*

The parties dispute whether the phrase "usually situated" is ambiguous as it is used in the provision that limits coverage to 10 percent of the policy limits for personal property that is "usually situated" in a location other than at the residence covered by the policy. The Weisses contend that the trial court erred in concluding that the phrase is unambiguous, as well as in the application of the court's interpretation of the phrase to the circumstances of their claims.

"Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation. [Citation.] 'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the "mutual intention" of the parties. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.] Such intent is to be inferred, if possible, solely from

the written provisions of the contract. [Citation.] The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation." [Citations.]'" (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 647-648 (*MacKinnon*).)

A provision in an insurance policy "will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. [Citation.] But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract.' [Citation.]" (*MacKinnon*, *supra*, 31 Cal.4th at p. 648; see also *Dore v. Arnold Worldwide, Inc. v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391 ["'An ambiguity arises when language is reasonably susceptible of more than one application to material facts. There cannot be an ambiguity per se, i.e. an ambiguity unrelated to an application' [citation]"].) "[T]he court must interpret the language in context, with regard to its intended function in the policy. [Citation.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265.)

"Moreover, insurance coverage is ""interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer."" [Citation.]" (*MacKinnon, supra*, 31 Cal.4th at p. 648.)

Although the relevant policy language in all three of the Weisses' homeowner policies is identical, the circumstances under which that language is to be applied, and thus, by which any ambiguity is to be judged, differ as to each residence. We must therefore consider the terms of each policy in relation to the particular circumstances

under which the Weisses invoke coverage in order to determine whether the relevant policy language is or is not ambiguous. As we discuss below, we conclude that the relevant language in the Avenida Alteras policy is unambiguous as it relates to the property loaned from that home, and limits the Weisses' recovery to 10 percent of the policy limits under that policy. As to the Calle Portone and Calle Amanacer policies, we conclude that the language is ambiguous, and that the 10 percent policy limits do not apply.

1. *The trial court erred in concluding that the term "usually situated" is unambiguous as to all three policies*

In concluding that the 10 percent limitation applies to all three of the Weisses' claims, the trial court determined that the meaning of "usually situated" is not ambiguous, and that because the Weisses' loan of the collection to Chabad was open-ended, none of the items in the collection could be considered to be "usually situated" at any of the three residences covered by the homeowners policies. We disagree with the trial court's analysis.

a. *The trial court failed to consider the question of ambiguity in the context of the specific claims being made under each policy*

The trial court concluded as to all three policies that the "insuring agreement is not ambiguous, the ten percent limitation is not ambiguous, and the insuring agreement when read together with the ten percent limitation is not ambiguous." Specifically, the trial court concluded that the term "usually situated" at a location other than the residence premises referred to property that was situated somewhere other than at the residence for

more than 50 percent of the time that Joseph Weiss possessed the property.[8] In reaching this conclusion, the court stated, "And when [the collection] w[as] loaned to Chabad the question is: Did that start a new period of the time [by which the 50 percent should be calculated]?" The court went on to further frame the question before the court and provide an answer to it:

> "Was this just a temporary loan or one that was limited to the time necessary to have a grand opening or was this an open-ended loan that extended long enough that these items would be placed in Chabad's library. That they would be loaned to over 300 different other Chabad locations. [¶] If it's the former, I believe the usual place where they were usually situated would be at the residence insured by the Auto Club. . . . [¶] And, on the other hand, if the loan was open-ended and without any clear limit to it and one long enough to perpetuate the tradition of these documents . . . . [¶] I believe under that interpretation a normal person would say these items were not usually, that these items were not usually situated at one of these residences. They were usually situated at Chabad."

The court erred in failing to examine the language of each policy in the context of the specific claim made against that policy. As a result, the court also erred in concluding that the phrase "usually situated" is unambiguous as to all three policies, since the term is

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8 The trial court agreed with the Weisses' contention that "usually situated" means "'more than 50 percent of the time,'" saying "I think that is a reasonable definition[,] 'more than 50 percent of the time.'" The court then asked, "But more than 50 percent of what time? Because this property . . . ha[s] existed for, at least, 60 years, 65 years. [¶] So when we say 'more than 50 percent of the time' we have to talk about what time. It's not the total time of [the collection's] existence. [¶] So I believe that time commonly understood is the time when some change in the custody of these things starts a new period of the time running. When they were given to Dr. Weiss I think that started a new period of the time."

susceptible to a variety of interpretations in the absence of further context.[9] It is possible that a reasonable person would understand the term "usually situated" to mean something other than what the trial court determined it meant—i.e., a calculation of the amount of time the property was at one location as opposed to another. For instance, if one understood the word "usually" to mean "customarily" or "in the ordinary course of business," it would not be unreasonable for an insured to believe that this definition implicitly included some consideration of the insured's *intention* to keep, use, and/or maintain the property at the residence.[10]

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[9] The fact that the Exchange itself had trouble determining whether the 10 percent limitation applied to the Weisses' claims supports the conclusion that this term is ambiguous, at least in the abstract. Jimmy Young, the manager of the Exchange's homeowners claims department, testified that an adjuster assigned to handle the Weisses' claims sought his advice as to whether or not the 10 percent limit would apply "if the property was not in the house that we insured." Young testified that he, in turn, sought the advice of his superiors regarding the issue because "it was a unique situation" and he thought that "getting more people involved . . . would be the prudent thing to do." Ultimately, the Exchange referred the question of whether the 10 percent limitation applied to the Weisses' claims to "outside coverage counsel" for a "coverage opinion."

[10] Consider an example of this type of situation: An insured acquires a piece of property in January and keeps that property at his residence until March. The insured then loans the property to a friend who tardily returns the property in September. The property is then destroyed by a fire at the residence in October. The insured might reasonably expect that the property he acquired and intended to maintain at his residence would be deemed "usually situated" at his home, and thus not subject to the 10 percent limitation, despite the fact that the property had not been located at the residence for more than 50 percent of the time the insured possessed it.

Even if one were to accept that the only reasonable interpretation of the phrase "usually situated" is the interpretation the trial court applied, the court's own discussion of the issue demonstrates that this interpretation is incomplete. If one concludes that "usually" means "more than 50 percent of the time," a relevant question remains: From what point should one begin to calculate 50 percent of the time? The point from which one is to calculate the amount of time certain property was situated at the residence must be determined before one can give meaning to the term "usually," even under the trial court's interpretation. As the trial court indicated, the question, "50 percent of *what* time" can be answered in a number of ways. "Usually situated" could be interpreted to mean that an item was situated at a particular location for more than 50 percent of the time the insured owned the property, or more than 50 percent of the past year, or more than 50 percent of the time the insured maintained the insurance policy at issue. Any of these measurements would be reasonable interpretations of the term "usually situated." For this reason, we must look to each of the policies and to the circumstances of each claim to determine whether, under those particular circumstances, the phrase "usually situated" is or is not ambiguous.

b. *The trial court improperly relied on the existence of indefinite loans to Chabad to conclude that the 10 percent limitation applied to the Weisses' claims*

We reject the trial court's conclusion that because the Weisses loaned their collection to Chabad for an indefinite period of time, a "normal person would say these items were not usually . . . situated at one of these residences." Although the trial court

found that the loans were indefinite,[11] the fact remains that the items in question were loaned to Chabad, not donated. The Weisses thus clearly intended that the property would be returned to them. The Weisses normally kept the property at one of their homes.[12] The items had been on loan to Chabad for only a matter of months when they were destroyed. It is impossible to determine how long the materials would have remained at Chabad, or whether Chabad would have had possession of them for more than 50 percent of the time the Weisses owned them. Further, even if one could determine the intent of the parties at the time the loans were made, that was subject to change at any time;[13] the Weisses might have retrieved their collection of artifacts from Chabad weeks after the date of the fire, or years.

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[11] As written in the statement of decision, the court found only that a "loan" was indefinite, without specifying any one loan of the three made to Chabad. We interpret the court's decision as referring to the three separate loans collectively as a single loan with regard to this issue.

[12] The Weisses also contend that the trial court's conclusion that the loan to Chabad was indefinite and that the parties intended that the items be loaned to other Chabad organizations around the world is not supported by substantial evidence. However, regardless of the nature of the loans, they were loans, and the parties clearly intended that the items would be returned to the Weisses. Whether those items were to be sent to other Chabad locations or not is thus irrelevant.

[13] There was conflicting evidence as to what the parties' intent was concerning the anticipated duration of the loans. The trial court relied on the following language in Rabbi Fradkin's letters to conclude that the loans were intended to be long-term and that Chabad intended to send the materials all over the world: "With the receipt of this loan Friends of Chabad Lubavitch, San Diego is enabled to further our cultural and education mission on a global scale. Our newly created Jewish Heritage Library has initiated a lending network of fine art, ancient prints and literature to countless libraries through our 3000 affiliate centers around the world thereby helping the entire network of Chabad Lubavitch centers worldwide further our common goal. We are happy to say that we

One cannot interpret a limitation of coverage based on what might have happened if the loss had not occurred. Thus, contrary to the Exchange's argument and the trial court's conclusion, the fact that the loans to Chabad had no definite end date is not dispositive as to whether the portions of the collection were "usually situated" at any of the three residences.

However, because the trial court relied on other, independent reasons in concluding that the 10 percent limitation applied to each policy, we consider the terms of the separate policies in the context of the specific circumstances surrounding the claims under each policy.

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have begun loan of exhibits that represent a cross section of our collection to centers throughout Israel and Africa. [¶] "[¶] [¶] . . . We greatly appreciate your kindness and assure you that we will fully utilize this wonderful collection. On behalf of the network of libraries, community and youth centers affiliated with the Jewish Heritage Library we thank you . . . " This language does not necessarily mean that Chabad intended to send the loaned materials around the world. It could mean that the Weisses' loan enabled Chabad to loan out items from its own exhibit collections to centers around the world. Beyond the fact that the language of the letters is itself ambiguous as to Chabad's intent, Rabbi Fradkin testified that he had not meant to give the impression that the Weisses loaned items would be sent around the world. He testified that he never had any intention of distributing the loaned materials to other Chabad centers. Joseph also testified that he and Rabbi Fradkin had agreed that Chabad would not lend items from the Weisses' collection. There was thus conflicting evidence regarding how the parties intended the loaned items to be used in the future.

2. *The Exchange is required to pay the Weisses only 10 percent of the policy limits for the portion of the collection loaned from the Avenida Alteras residence*

a. *The phrase "usually situated" is not ambiguous as applied to the Weisses' claim under the Avenida Alteras policy*

Although the phrase "usually situated" may be ambiguous in the abstract because it is susceptible to multiple interpretations, the fact that a word or phrase carries multiple meanings does not by itself render it ambiguous in every set of circumstances. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 868.) The language of the policy limitation "'will shift between clarity and ambiguity with changes in the event at hand. [Citation.]" (*Ibid*.) The real question, then, is whether "usually situated" is ambiguous in the context of the Avenida Alteras policy and the circumstances of the loss of the personal property formerly stored at that location. (See *Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1265.)

We conclude that the 10 percent limitation applies unambiguously to the Avenida Alteras policy. (See *Herzog v. Nat'l Am. Ins. Co.* (1970) 2 Cal.3d 192, 198 ["While we agree that the phrase 'ways immediately adjoining' is somewhat imprecise, we do not believe that it is so ambiguous as to defy reasonable construction in the context of a particular case. [Citation.]"].) Considering the pertinent language in the insurance policy in the context of the instrument as a whole and in the circumstances of this case, we conclude that although the term "usually situated" may be ambiguous in the abstract, the Weisses could not have had an objectively reasonable expectation that property that they

had moved out of a house that they no longer owned could, under any circumstances, be considered to be "usually situated" at that residence.[14]

The phrase "usually situated at a location other than the residence premises" necessarily includes property that has been moved out of a residence when there is no possibility that the property will ever be returned to that residence. Specifically, the language of the 10 percent limitation, when read in conjunction with the sentence that follows it, unambiguously excludes from full coverage property that the insured has permanently removed from a residence. The relevant language provides:

> "Our limit of liability for personal property usually situated at a location other than the *residence premises* is 10% of the amount of the limit of liability for COVERAGE C. Personal property in a newly acquired principal residence is not subject to the limitation for the 30 calendar days immediately after you begin to move the property there."

The second sentence provides an exception to the 10 percent limitation, in that the policy will cover in full personal property that the insured has moved into a new residence for 30 days after the property is moved. The implication is that outside the bounds of this exception, once the insured has moved personal property out of the covered residence permanently, that property will not be fully covered. Once the Avenida Alteras house had been sold, the Weisses could have had no reasonable expectation that *any* of the personal property that they had moved out of that residence,

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[14] Although the language limits coverage for personal property that is "usually situated at a location other than the ***residence premises***," the converse is necessarily true, i.e., that the 10 percent limitation does not apply to personal property that is usually situated at the residence.

whether that property was on loan at another location or not, would be considered to be "usually situated" at the Avenida Alteras home.

As noted above, the Weisses sold the Avenida Alteras residence in April 2003 and removed their property from that residence at some time thereafter. On September 26, 2003, they entered into a settlement with the purchaser of that residence concerning the purchaser's complaints of leaks and mold. There was no real possibility that the Weisses would reacquire title to the Avenida Alteras property, nor was there any real possibility that any portion of their collection would ever be returned to that location after that point in time. There is no question that the collection had been permanently removed from the Avenida Alteras home prior to the time the loss occurred in October 2003. Therefore, at the time of the loss, the portion of the collection that the Weisses had previously kept at the Avenida Alteras residence had been permanently removed from that house and could not reasonably be said to be "usually situated" at that location under any interpretation of the phrase. We therefore conclude that the 10 percent limitation in the Avenida Alteras policy unambiguously applies to the items in the collection that the Weisses had loaned from the Avenida Alteras home.

b. *The Weisses' alternative arguments in favor of full coverage under the Avenida Alteras homeowners policy fail*

The Weisses make four additional arguments in favor of full coverage under the Avenida Alteras policy. The Weisses argue that the policy's limitation provision does not meet the requirement that exclusionary policy provisions be conspicuous, plain, and clear. They also contend that an exception to the 10 percent limitation provision, which

provides for full coverage for a limited period of time after the insured moves out of a residence, applies in their circumstances. The Weisses further maintain that the Exchange should be estopped from denying full coverage under the Avenida Alteras policy because of representations made by its agent, Edward Biddison, to the effect that the Weisses' personal property would continue to be fully covered even after they moved out of their Avenida Alteras home. Finally, the Weisses argue that the Exchange failed to show that an "indefinite loan" to Chabad materially increased its risk of loss.[15]

i. *The exception is conspicuous, plain and clear, as applied to the claim on the Avenida Alteras policy*

The Weisses contend that the language of the policy limitation should not be enforced because it is not "conspicuous, plain and clear." We disagree with this contention.

Policy exclusions are to be strictly construed. (*E.M.M.I., Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 471 (*E.M.M.I.*).) """[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again 'any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.' [Citation.] Thus, 'the burden

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15 The Weisses make three of these four arguments in favor of full coverage as to all three of their homeowners policies, not only the Avenida Alteras policy. The only argument that is devoted separately to the Avenida Alteras property is the contention that the exception to the 10 percent limitation provision applies to the claim made under the Avenida Alteras policy. Because we conclude in part III.A.3., *post*, that full coverage of the Weisses' claims under the Calle Portone and Calle Amanacer properties is appropriate on other grounds, we need not address these additional arguments as to the claims made under the Calle Portone and Calle Amanacer policies.

rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language.' [Citation.] The exclusionary clause 'must be *conspicuous, plain and clear*.'" [Citation.] This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded.' [Citation.]" (*Id*., citing *MacKinnon, supra,* 31 Cal.4th at p. 648.) "Thus, any such limitation must be placed and printed so that it will attract the reader's attention. Such a provision also must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson." (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204.)

The trial court determined that the 10 percent limitation was "conspicuously located on page 4 of each policy." We agree that the 10 percent limitation is not hidden in the policies; it is written in the same font size as the other policy provisions, and is the first sentence in the third paragraph under the heading "WHAT PROPERTY IS COVERED ─ COVERAGE C." The limitation appears only a few lines down from the statement regarding coverage for personal property. There is nothing inconspicuous about the limitation language.

Similarly, with regard to whether the limitation is "plain and clear" in the context of those portions of the collection on loan from the Avenida Alteras residence, we conclude that it is. In order to be "plain and clear," a limitation must be precise and understandable. (*Haynes v. Farmers Ins. Exchange, supra*, 32 Cal.4th at p. 1204.) The limitation provision uses words that the average person would understand. Further, an insured could not reasonably expect that the property on loan to Chabad from the

Avenida Alteras residence would be fully covered under the policy once the Weisses had sold that house and had vacated it (see part III.A.2.a., *ante*). Specifically, no insured could possess a reasonable expectation that personal property that has been permanently removed from the residence would continue to be fully covered. The exclusionary language was thus clear and plain with regard to personal property that the Weisses had previously kept at the Avenida Alteras home.

ii. *The exception to the 10 percent limitation does not apply*

The Weisses argue in the alternative that even if the 10 percent limitation applies to their claim as to property loaned from the Avenida Alteras residence, the exception to that limitation also applies in this situation, and would provide for full coverage. Again, the paragraph in question provides:

> "Our limit of liability for personal property usually situated at a location other than the residence premises is 10% of the amount of the limit of liability for COVERAGE C. *Personal property in a newly acquired principal residence is not subject to the limitation for the 30 calendar days immediately after you begin to move the property there*." (Italics added.)

The Weisses contend that "an insured has a right to expect full continuous coverage of his personal property during the interim storage period [in which an insured is prevented from immediately moving into a new home and must place belongings in temporary storage] so long as he keeps coverage in force under the old policy." According to the Weisses, "[t]his expectation is justified because an insured would have no insurable interest in a new home until the home is actually built and purchased."

The exception to the 10 percent limitation, which allows for full coverage under limited circumstances, does not apply to the personal property at issue here. That exception applies only to personal property that has been moved, or is being moved, to a new principal residence; the exception covers "[p]ersonal property *in* a newly acquired principal residence." (Italics added.) According to the record, the Weisses never moved, or began to move, the personal property at issue here *into* a new residence. The property thus does not fall within the scope of the exception. In addition, the exception to the 10 percent limitation applies for only 30 days after the insured begins to move the property out of the old residence and into a new residence. Even if we were to interpret the exception as applying to property that has been moved out of the old residence but that is not yet *in* the new home, the Weisses sold and began moving their property out of the Avenida Alteras home more than 30 days before the Cedar fire.[16] The exception to the 10 percent limitation thus does not cover that portion of the collection that the Weisses loaned to Chabad from the Avenida Alteras residence.

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16 The Weisses contend that because the purchaser of the Avenida Alteras residence threatened rescission of the sales contract, the date on which their property should be deemed to have been moved should be the date on which they settled their dispute with the new owner of the Avenida Alteras residence, which occurred exactly 30 days before the fire. The date on which the Weisses' settled the matter with the new owner of the Avenida Alteras property is irrelevant to the question whether the exception to the 10 percent limitation applies.

iii. *There is no basis for reversing the trial court's conclusions regarding the Weisses' assertions of estoppel*

The Weisses contend that the Exchange is estopped from denying full coverage. Specifically, the Weisses argue that the trial court erred in not accepting the testimony of Joseph Weiss, which they contend was uncontradicted, concerning Biddison's promises of continued coverage. The Weisses maintain that their insurance agent, Ed Biddison, represented to them that their personal property would be covered under the Avenida Alteras policy while their new home was being built on the vacant lot, as long as they kept the policy in force until the new home was completed. They assert that the Exchange should be bound by its insurance agent's misrepresentations. The Exchange disputes the Weisses' contention that the evidence on this matter was uncontradicted. The record supports the Exchange's position.

Joseph Weiss testified that Biddison "said as long as we maintain the policy, paid the premiums on that, that that would cover us until the new house was ready for occupancy and he would write us a policy for the new house." Biddison, on the other hand, stated that he at no time told either of the Weisses that the homeowners policy would provide full personal property coverage if they were to move their property out of the Avenida Alteras house to another location that was not a new residence. On cross-examination, Biddison did admit that he could not recall the substance of all of the discussions he had with Joseph Weiss regarding coverage on the Avenida Alteras home. However, he was not asked whether he might have forgotten having told the Weisses that they would continue to have full coverage on their personal property after they moved it

out of the Avenida Alteras residence. The trial court was free to weigh this evidence and to conclude that Biddison's specific denial of having made any statements to the effect that the Weisses' personal property would be fully covered if they were to move their personal property out of the home and to a location other than their new home was credible, even though Biddison was unsure about all of the details of the conversations he had had with Joseph Weiss. This evidence was sufficient to defeat the Weisses' estoppel argument.

iv. *The Exchange did not have to show an increased risk of loss resulting from the loan*

The Weisses argue that "[i]t has long been the law in California that an insurer's efforts to limit its coverage must bear some relationship to increased risk of loss." According to the Weisses, the Exchange failed to establish that the limitation of coverage bears some relationship to an increased risk of loss, and that the Exchange therefore should not be permitted to rely on the 10 percent limitation that is set forth in all three homeowners policies. Citing *Raulet v. Northwestern National Ins. Co. of Milwaukee* (1910) 157 Cal. 213 (*Raulet*), and *Jordan v. Allstate Ins. Co.* (2004) 116 Cal.App.4th 1206, the Weisses assert that the Exchange was required to show the "specific purpose or function" served by the 10 percent limitation in the policies and to demonstrate that its risk of loss materially increased as a result of the Weisses loan to Chabad. We find no support in these authorities, or elsewhere, for the Weisses' argument on this point. For example, the *Raulet* court discusses what a court *may* consider when attempting to give the language of a policy a reasonable construction in view of the purposes of the policy.

However, that case does not suggest that the Exchange was required to prove that there was an increased risk of loss resulting from the Weisses' loan to Chabad:

> "'The court was entitled to look at the circumstances surrounding the execution of the instrument; at the situation of the parties to it, and at what was done under it, to determine its true character, and was not concluded [*sic*] by the bald fact that it was labeled "chattel mortgage" or was in the form usual to chattel mortgages; and also to examine into the theory of the provision against chattel mortgages, the reason for its insertion, the evils or added risks to the insurer that it was designed to guard against; and after having made this examination, to determine whether the instrument before it was of such nature as to violate the true intent of that provision.' [Citation.]" (*Raulet, supra*, 157 Cal. at p. 218.)

We agree that a court interpreting an insurance contract should be mindful of the purpose of the contract and the reasons behind the inclusion of certain provisions. However, this does not mean that the insurer must prove the existence of an increased risk of loss when the terms of the policy clearly exclude coverage under the circumstances in which it is being claimed.[17]

Because we conclude that the terms of the 10 percent limitation in the Avenida Alteras policy unambiguously apply to the property loaned to Chabad from that residence, we affirm that portion of the trial court's judgment concluding that the Exchange has paid the Weisses the full amount due to them under the terms of that policy.

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17 The personal property covered under the Avenida Alteras policy is not necessarily subject to the 10 percent limitation in the policy because it was in a different location, on loan. Rather, the relevant fact requiring application of the 10 percent limitation is that the Weisses moved the property out of the Avenida Alteras residence and had no intention of ever returning it to that residence.

3. *The phrase "usually located" in the limitation provision is ambiguous in the context of the Calle Portone and Calle Amanacer residences, and should thus be interpreted narrowly and in favor of full coverage*

The circumstances of the Weisses' claims under the policy covering the Calle Portone residence render ambiguous the application of the phrase "usually situated" to the property on loan from that residence. The Weisses still owned the Calle Portone residence at the time the Cedar fire destroyed the portion of the collection that was on loan to Chabad from the Calle Portone property. Unlike the situation with the Avenida Alteras property where there was no possibility that the items would be returned to that home, at the time the items from the Calle Portone residence were destroyed, it was possible that they might have been returned to that residence. As a result, the ambiguities regarding the meaning of the phrase "usually situated" discussed in part III.A.1.a., *ante*, apply in this context.

The same reasoning that applies to interpretation of the policy limitation as to the Calle Portone residence applies to the Calle Amanacer residence as well. At the time of the fire, portions of the collection that the Weisses had stored at the Calle Amanacer residence were on loan to Chabad. Those items could have been returned to the Calle Amanacer residence at any time, because the Weisses owned the Calle Amanacer residence at the time of the fire.[18] Thus, the limitation language is ambiguous with

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18 While the Weisses had listed the Calle Amanacer property for sale before the property was lost in the Cedar Fire, the residence had not been sold. It was thus still possible that the property on loan to Chabad might have been returned to this residence.

regard to that portion of the Weisses' collection that was on loan to Chabad from the Calle Amanacer residence.

Because we conclude that the phrase "usually situated" is ambiguous as it relates to the Calle Portone and Calle Amanacer policies, we look to see whether there is a way to interpret that language in a manner consistent with the insured's objectively reasonable expectations. (See *Bank of the West, supra*, 2 Cal.4th at p. 1265.) It is objectively reasonable for an insured to expect that personal property on loan elsewhere, but normally kept at a residence owned by the insured, would be covered under "COVERAGE C" in the policies, which provides that the Exchange will "cover personal property owned or used by any insured while it is anywhere in the world."

Additionally, the language of the limitation that provides that coverage for personal property "usually situated at a location other than the residence premises is 10% of the amount of the limit of liability for COVERAGE C," could reasonably be understood not to apply to items an insured has loaned out on a temporary, albeit open-ended, basis. At a minimum, the policy language does not alert a reasonable insured that coverage will be reduced to 10 percent if he or she loans an item to someone else on a temporary basis. (See *E.M.M.I., Inc., supra*, 32 Cal.4th at p. 474 ["Because the exclusionary clause as a whole is ambiguous, it cannot be said to be clear and plain in limiting coverage. [Citation.] In no way does the policy language alert a reasonable insured that coverage is lost by simply stepping outside of the vehicle"].) Under normal circumstances, the Weisses' would keep their collection with them at "home," wherever that might be (i.e., at the Calle Portone or Calle Amanacer residence). It was only under

an unusual set of circumstances that the personal property at issue was not being stored at one or more of their residences at the time of the loss. The Weisses could have reasonably believed that their collection would be fully covered under the policies if they and Chabad intended that the collection would ultimately be returned to the Weisses. The provision should thus be interpreted broadly in favor of the Weisses to provide full coverage for the loss of those portions of the collection that were normally kept at the Calle Portone and Calle Amanacer residences. (See *Kazi v. State Farm Fire & Casualty Co.* (2001) 24 Cal.4th 871, 879 [court must resolve an ambiguity in favor of the insured, consistent with the insured's reasonable expectations].)

The facts to which the coverage language must be applied are not in dispute. The Exchange does not dispute that the destroyed items were the Weisses' personal property, or that the property was covered under the Calle Portone and Calle Amanacer policies. Nor does Exchange dispute that the items had been located in the Calle Portone and Calle Amanacer residences prior to being loaned to Chabad, or that the items were loaned to Chabad, not donated. The Exchange also does not dispute the fact that the Weisses owned both the Calle Portone and Calle Amanacer residences at the time their collection was lost in the Cedar fire. Under these undisputed facts, the Exchange must compensate the Weisses with the full policy limits for unscheduled personal property under the Calle Portone and Calle Amanacer policies, rather than paying only 10 percent of these limits.

B. *This court will not order that attorney fees be paid pursuant to a settlement agreement between the parties*

The Weisses note that pursuant to the settlement agreement regarding their bad faith claim, the Exchange agreed that the court would add attorney fees to the judgment in an amount equal to 30 percent of any contract benefits awarded to the Weiss family. The Weisses ask this Court to "include an additional sum for attorneys' fees as provided in the parties' stipulations" if we reverse the judgment and remand to the trial court for entry of a judgment in favor of the Weisses. We decline to enter such an order since there is no claim of error with regard to an award of attorney fees before us on appeal. Rather, we remand the matter to the trial court to consider the issue of the effect of the settlement agreement, if any, on the amount of the judgment.

IV.

DISPOSITION

We affirm the trial court's conclusion that the 10 percent limitation applies to the Weisses' claim made under the Avenida Alteras homeowners policy, and that the Weisses are entitled to take nothing with regard to this claim because the Exchange has paid them 10 percent of the Avenida Alteras policy limits. We reverse the trial court's conclusion that the 10 percent limitation applies to the Weisses' claims made under the Calle Portone and Calle Amanacer homeowners policies. The Exchange should have paid the Weisses policy limits for unscheduled personal property under both the Calle Portone and Calle Amanacer policies. Because the Exchange previously paid the Weisses 10 percent of the relevant limits for unscheduled personal property under both of these policies, the

Weisses are entitled to the difference between the relevant policy limits and the amount they have already received from the Exchange.

The judgment is therefore reversed insofar as it fails to award the Weisses the policy limits under the Calle Portone and Calle Amanacer policies. The matter is remanded to the trial court for consideration of any additional issues raised by this court's disposition, including the issue of attorney fees, and for entry of a new judgment consistent with this opinion.

Each party shall bear its own costs on appeal.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.